

## The New Bankruptcy Rules

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### Repository Citation

Louis W. Levit, *The New Bankruptcy Rules*, 57 Marq. L. Rev. 1 (1973).

Available at: <http://scholarship.law.marquette.edu/mulr/vol57/iss1/1>

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## THE NEW BANKRUPTCY RULES

LOUIS W. LEVIT\*

### INTRODUCTION

On April 24, 1973 the Supreme Court of the United States issued the new Bankruptcy Rules and Official Forms covering General Bankruptcy Cases and wage-earner plans (Chapters I to VII and XIII of the Bankruptcy Act).<sup>1</sup> These Rules which took effect on October 1, 1973 reflected more than ten years of painstaking endeavor by the Advisory Committee on Bankruptcy Rules appointed in 1960 by the Chief Justice pursuant to authority conferred by 28 U.S.C. Section 131, as amended in 1958. The improvement and modernization of practice in bankruptcy cases under the Rules promises to be even greater than that effected in ordinary civil cases through the adoption of the Federal Rules of Civil Procedure.

Prior practice in bankruptcy procedure was governed primarily by extensive statutory provisions contained in the various chapters of the Bankruptcy Act,<sup>2</sup> amplified by the General Orders promulgated by the Supreme Court,<sup>3</sup> pursuant to authority conferred by former Section 30 of the Act.<sup>4</sup> The Federal Rules of Civil Procedure were applicable only to the extent not inconsistent with either

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1. Proposed rules covering business reorganizations (Chapters X and XI) are now under consideration and should be issued shortly. This article will be concerned only with the so-called "straight bankruptcy" rules.

2. 11 U.S.C. §§ 1-1103 (as amended 1968).

3. *Id.*, § 53 *et seq.* (hereinafter referred to as the "General Orders").

4. *Id.*, § 53, repealed 1964, Public Laws 88-623.

the Act or the General Orders.<sup>5</sup>

Until 1964 the Supreme Court's rule-making powers in Bankruptcy cases were expressly limited to promulgation of rules, forms and orders consistent with the Act.<sup>6</sup> In 1964 on the recommendation of the Advisory Committee, Congress ceded supremacy to the Court by repealing Section 30 and enacting in its place Section 2075 of the Judicial Code.<sup>7</sup> Under Section 2075, rules promulgated by the court, if not expressly rejected by Congress prior to their effective date, supersede all conflicting statutory provisions, subject only to the limitation that they neither abridge, enlarge, or modify any substantive right.<sup>8</sup>

Accordingly, the new Rules cover, with minor exceptions, the entire gamut of procedure in ordinary bankruptcy proceedings, avoiding only matters of substantive right and matters going to the structure and jurisdiction of the court itself.<sup>9</sup> The line of demarcation between substance and procedure is, of course, not easily drawn, and there are instances where many will conclude that substantive rights are in fact being affected.<sup>10</sup>

Throughout the Rules, one can discern several consistent overall themes and objectives.<sup>11</sup> The Court has moved strongly in the direction of enhancing the judicial nature and authority of the Referee in Bankruptcy<sup>12</sup> and relieving him of many of the minis-

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5. General Order 37; BANKRUPTCY ACT § 21(k) (Hereinafter referred to as the "ACT"); 11 U.S.C. § 44(k).

6. ACT § 30, 11 U.S.C. § 53 repealed. 1964, Public Laws 88-623.

7. 28 U.S.C. § 2075 (1970).

8. The power of the court to regulate bankruptcy procedure was thus conformed to its powers in other areas of federal judicial proceedings. *Cf. Id.* § 2072.

9. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES AND OFFICIAL FORMS (March, 1971) (hereinafter cited PREL. DFT.), Introductory Note XXX, XXXIV.

10. See, e.g., notes 46, 76 and 82 *infra*, and accompanying text.

11. See PREL. DFT., Introductory Note, XXVIII-XXXIII.

12. The referee is a judicial officer whose office is created and defined by § 33(ff) of the Act 11 U.S.C. § 61(ff). Referees are appointed by the judges of each district for fixed terms not longer than six years (ACT § 34; 11 U.S.C. § 62). They serve specified territories designated by the Director of the Administrative Office of the United States Courts, but their jurisdiction is co-extensive with that of the respective court or courts by which they are appointed (ACT § 37; 11 U.S.C. § 65). Referees are invested generally with power to enter final orders and make final determinations in all matters referred to them, except in the rare instances where the Act restricts such jurisdiction to the judge (ACT §§ 1(9), (20), 38; 11 U.S.C. §§ 1(9), (20), 66). Orders of a referee are final unless reviewed by a judge on petition (now notice of appeal) filed within ten days after entry (ACT § 39(c); 11 U.S.C. § 67(e)). Under the new Rule 102 all proceedings will, on initiation, be referred to the referee who will thereafter, with certain minor exceptions, hear all matters in the first instance. Rule 102, PREL. DFT. 2-3.

terial burdens to which he is now subjected. Disposition of cases, particularly no-dividend cases, has been substantially expedited by curtailing or limiting administrative and procedural requirements. To the extent feasible, the procedure for contested matters has been conformed to civil practice under the Federal Rules of Civil Procedure, and territorial limitations have been relaxed, all to the end of achieving "a unitary, organic, administration of each bankrupt estate to the extent compatible with fairness and justice to parties in interest and with jurisdictional limitations."<sup>13</sup>

The discussion which follows will point out some, but by no means all, of the principal revisions and reforms to be anticipated in ordinary bankruptcy proceedings under this new procedure.

## PART I PETITION AND PROCEEDINGS RELATING THERETO AND ADJUDICATION

Part I (Rules 101-121, inclusive) deals with the procedures leading up to an adjudication in bankruptcy, whether voluntary or involuntary.<sup>14</sup>

Significant changes are introduced in two major areas—the venue for initiating proceedings, and the hearing of contested involuntary cases. Venue is presently controlled by Section 2(a)(1) of the Act<sup>15</sup> which provides that:

courts of bankruptcy are . . . invested with . . . jurisdiction<sup>16</sup>  
. . . to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any

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13. PREL. DFT. Introductory Note, XXXII.

14. A bankruptcy proceeding may be instituted either voluntarily by the debtor, or involuntarily by its creditors (or in the case of a partnership, by less than all partners). A voluntary petition need only show that the debtor has debts; adjudication of bankruptcy follows automatically. An involuntary petition requires a showing that the debtor has suffered or committed one or more Acts of Bankruptcy within the past four months. Involuntary petitions may be, but rarely are, contested by the debtors. The more common course is either to consent to adjudication or to attempt rehabilitation under one of the debtor-relief chapters of the Act.

15. 11 U.S.C. § 11(a)(1).

16. Although the Act uses the term "jurisdiction", case law has consistently established that these requirements relate only to venue. *Bass v. Hutchins*, 417 F.2d 692, 694-95 (5th Cir. 1969); *In re Eatherton*, 271 F.2d 199, 201-03 (8th Cir. 1959). Under present law, where venue is improperly laid, and timely objection is made, the court may in the interest of creditors either retain the proceeding or transfer it to any other court of bankruptcy without regard to venue requirements. Act § 32(c); 11 U.S.C. § 55(c).

other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any case transferred to them pursuant to this Act.

Rule 116(a) retains substantially the same criteria for natural persons, but limits corporate and partnership adjudication—except in the case of affiliated entities—to the district containing either the principal place of business or principal assets.<sup>17</sup>

It is in the area of affiliated entities that the most profound changes are effected. Formerly, the only provision for so-called “affiliate jurisdiction” in ordinary bankruptcy was in the case of partnerships. Section 5(d) of the Act<sup>18</sup> provided that “the court having jurisdiction<sup>19</sup> of a general partner may have jurisdiction of all the general partners and of the administration of the partnership and individual property.” The new rules not only retain and expand the provision as to partnerships,<sup>20</sup> but in addition, introduce a wholly new concept of affiliation among various types of entities.

Rule 901(3) defines an affiliate of a bankrupt as:

(A) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the bankrupt, or (B) a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (C) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (D) a person substantially all of whose property is operated under lease or operating agreement by the bankrupt, or (E) a person who operates under lease or operating agreement substantially all of the property of the bankrupt.

Rule 116(4) provides succinctly “. . . a petition commencing a bankruptcy case may be filed by or against an affiliate of the bankrupt in a district where a petition under the Act by or against

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17. This conforms to the present venue requirements for original petitions for corporate reorganization under Chapter X. Act § 128; 11 U.S.C. § 528.

18. 11 U.S.C. § 23(d) (now superseded by Rule 116(a)(3)).

19. *Supra* note 15.

20. Rule 116(a)(3) provides that not only the filing of a petition by or against a partner in a court of appropriate venue, but also the filing of a petition by or against the partnership confers venue on that Court to administer the estate of all other general partners.

the bankrupt is pending.”<sup>21</sup>

These affiliation rules are supplemented by Rule 117(b) which authorizes the court to order joint administration of proceedings pending in the same court and involving either (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general members of a partnership, or (4) a bankrupt and an affiliate, . . . provided that the court first give “due consideration to the protection of creditors of the different estates against potential conflicts of interest.”

The combined effect of these rules will be that in most cases involving related entities, the various estates will be jointly administered in one court. Although this may create inconvenience or even hardship in isolated instances, the overall result promises substantial economies and efficiencies in the administration of related proceedings.

Substantial innovations are also prescribed for contested involuntary proceedings. Procedural requirements relating to service of process, time for response, types and description of response and pre-hearing examination are revised to conform, to a much greater extent, to present federal practice under the Rules of Civil Procedure.<sup>22</sup>

Rule 115 prescribes the procedure for the actual hearing of a contested petition. It preserves the right to jury trial conferred by Section 19a of the Act,<sup>23</sup> but consistent with the express objective of enhancing the office of the referee, provides that the referee may conduct such trials unless either the alleged bankrupt demands, or local rules specify, that the trial be conducted before the district judge.<sup>24</sup>

In accordance with the general objective of the Rules, Rule 121

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21. *Cf.* the far more limited provisions of § 129 of Chapter X (11 U.S.C. § 529) providing, that, to the effect that if a corporation is a subsidiary, an original petition by or against it may be filed either as provided in § 128 of the Act or in the Court which has approved the petition by or against its parent corporation.

22. *See* Rules 111, 112, 114 and accompanying Advisory Committee notes.

23. 11 U.S.C. § 42(a) “A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency . . . and of any acts of bankruptcy alleged in such petition to have been committed.”

24. Rule 115(b)(1) Neither the Act nor the General Orders ever contained any provision precluding jury trials before referees, but the Judicial Conference, in response to an inquiry from Senator Eastland in 1960, express the opinion that only judges should preside at jury trials of involuntary petitions in bankruptcy. The new rule is apparently the result of a compromise between those members of the Advisory Committee who desired to grant full authority to the referees to hear jury trials and those who wished to retain the former prohibition.

makes applicable to all proceedings relating to contested adjudications the major portion of the so-called adversary proceedings rules of Part VII<sup>25</sup> which in turn, are adaptations of the Federal Rules of Civil Procedure designed specifically for use in the hearing of most contested matters within a bankruptcy proceeding.

## PART II ADMINISTRATIVE MATTERS

Part II of the new Rules, notwithstanding its seemingly innocuous and ministerial subject matter, contains some of the most controversial provisions, and deals with some of the perplexing problems of bankruptcy practice.

### A. *Solicitation of Proxies*

The one Rule which has undoubtedly engendered the most comment and debate is Rule 208 covering solicitation and voting of proxies. The background and purpose of this Rule is summarized by the Advisory Committee as follows:<sup>26</sup>

Creditor control is a basic feature of the Act. Creditor participation in administration is facilitated by the definition of "creditor" in the Act (Section 1(11)) to include the duly authorized agent, attorney, or proxy of the owner of a provable claim. Creditor democracy is perverted and the congressional objective frustrated, however, if control of administration falls into the hands of persons whose principal interest is not in what the estate can be made to yield to the unsecured creditors but in what it can yield to those involved in its administration or in other ulterior objectives.

To prevent such abuse of creditor control, Rule 208 imposes strict curbs on the solicitation and use of proxies<sup>27</sup> in bankruptcy proceedings. Solicitation of proxies is defined as:

any communication *other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent him*, by which a creditor is asked, directly or indirectly, to give a proxy after

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25. Rules 701 to 782 inclusive. See discussion notes 111-130 *infra*, and accompanying text.

26. Advisory Committee Note to Rule 208.

27. A "proxy" is defined to "include a power of attorney, proof of claim, or other writing authorizing any person who does not then own a claim to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of an estate in bankruptcy. Rule 208 (a)(1).

or in contemplation of the filing of a petition by or against the bankrupt.<sup>28</sup> (Emphasis Added)

Such solicitation of proxies is absolutely prohibited except by the following prescribed persons or organizations:

1. A creditor owning a provable claim on the date of the filing of the petition;<sup>29</sup>

2. A committee of creditors elected at a regularly scheduled meeting of creditors in court,<sup>30</sup> or selected at an out-of-court meeting at which all creditors holding claims over \$500 or the 100 creditors having the largest claims had at least five days notice in writing and of which written minutes were kept reporting all pertinent details of the meeting.<sup>31</sup>

3. A bona fide trade or credit association from creditors who were members or subscribers in good standing and owners of provable claims on the date of bankruptcy.<sup>32</sup>

All solicitations must be in writing<sup>33</sup> and may not be made in any interest other than that of general creditors; or by or on behalf of any receiver, trustee, assignee for benefit of creditors, or attorney at law or creditor disqualified from voting, or transferee of a claim for collection only.<sup>34</sup>

Holders of more than one proxy must, before the voting commences at any meeting, file a verified list of proxies to be voted and, with respect to proxies that have been solicited, detailed statements as to the solicitation, execution and delivery of the proxies and express disavowal that any consideration has been paid or promised therefor. These statements must also include detailed verified statements as to whether there is any agreement which may have been made by the holder, solicitor or forwarder of the proxy with respect to sharing of compensation, or with respect to the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate.<sup>35</sup>

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28. Rule 208(a)(2).

29. Rule 208(b)(1)(A).

30. Rules 208(b)(1); 214.

31. Rule 208(b)(1)(c).

32. Rule 208(b)(1)(D).

33. Rule 208(b)(2). This requirement seems unduly harsh and almost impossible to enforce. It is obviously tied in with the provisions of Rule 208(d)(2), *infra*, requiring a copy of the written solicitation to be included in the detailed statement required from voters of multiple proxies.

34. Rule 208(c).

35. Rule 208(d).



If any proxy is determined to have been obtained or voted in violation of the Rule or in other improper manner, the court may either reject the proxy, vacate any election or other order effected through its use or take further appropriate action.<sup>36</sup>

### B. Selection of Receivers and Trustees

Closely allied to the regulation of proxy solicitation is the matter of election and compensation of officers of administration—the receiver, trustee and their attorneys and accountants. Existing regulations are strengthened and expanded under the new Rules. Receivers may be appointed only on application of a party in interest showing the specific facts necessitating the appointment.<sup>37</sup> A new provision permits the appointment of a receiver even after the first meeting of creditors to represent the estate in a contested or adversary proceeding when no trustee has qualified or when the interest of the trustee may be adverse to that of the estate.<sup>38</sup>

Selection and qualification of trustees is largely unchanged by the new Rules. Creditors entitled to vote under Rules 207<sup>39</sup> and 208<sup>40</sup> are entitled to elect the trustee at the first meeting<sup>41</sup> subject to the approval of the court.<sup>42</sup> The creditors' selection may be disapproved for ineligibility<sup>43</sup> or other good cause.<sup>44</sup>

Formerly, a vacancy in office, whether arising by death or disability, or upon reopening a closed proceeding, could be filled only by election at a special meeting of creditors called for that purpose.<sup>45</sup> The new Rules, for unexplained reasons, have disfranchised the creditors in these instances and authorize immediate

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36. Rule 208(e).

37. Rule 201(b). This rule is designed to eliminate the practice formerly prevailing in many areas of automatically subjecting every estate to the expense of a receiver and his counsel who served only during the short period from the initiation of the proceeding until the trustee was elected at the first meeting of creditors. Also, if the debtor has not yet been adjudged bankrupt (and thus is still vested with title to his property) he is entitled to notice and an opportunity to be heard in opposition to the application—Rule 201(c), *supra*.

38. Rule 201(a).

39. See discussion, *infra*.

40. See discussion, *infra*.

41. Rule 204.

42. Rule 209.

43. Eligibility requirements are specified by Rule 209(d) PREL. DFT. 79.

44. Personal preference of the court for another candidate, even when justified, does not, of course, constitute "good cause", either under former law, or the new Rules. Attempts by courts to impose their personal choice on the creditors nevertheless persist. See e.g., *In re Lenrich Sales Inc.*, 369 F.2d 439 (3 Cir. 1967); *In re Thomas*, 263 F.2d 287 (7 Cir. 1959).

45. ACT § 44; 11 U.S.C. § 72.

appointment of the successor by the court.<sup>46</sup> The Rules continue the statutory provision<sup>47</sup> for appointment by the court when the creditors fail to elect, or when the elected trustee either fails to qualify or is disapproved.<sup>48</sup>

Where joint administration is ordered pursuant to Rule 117(b)<sup>49</sup> the court may appoint or approve election of a single trustee to administer the joint estate, provided the court is satisfied that the creditors of the individual estates will not be prejudiced by a conflict of the trustee's interests.<sup>50</sup> In the case of partnerships, the Rules continue the substance of the Act<sup>51</sup> to the effect that the partnership trustee must serve as trustee of each individual estate except where the court, for cause shown, either permits election of, or appoints, a separate trustee.<sup>52</sup>

Eligibility of creditors to vote in elections is only slightly different from former practice. The minimum amount (for purpose of majority in number) is raised from \$50 to \$100<sup>53</sup> and persons controlling partnerships or having interests materially adverse to the estate are added to the claims of creditors excluded from voting.<sup>54</sup>

### C. Attorneys and Accountants

Employment of attorneys and accountants is regulated by Rule 215, which, in substance, adopts the standard of disinterestedness and necessity of employment formerly prescribed for attorneys alone by General Order 44.<sup>55</sup> Engagement of an attorney or accountant as a salaried employee is permitted without special authorization in the course of operation of a business.<sup>56</sup> Partners or regular associates may act on behalf of a duly employed attorney or accountant.<sup>57</sup> The authorization of a trustee or receiver to act as his own attorney or accountant is specifically permitted when in the best interest of the estate.<sup>58</sup>

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46. Rule 209(b)(3) and (4). Query, whether this curtailment of voting rights could not be considered an "abridgement of substantive rights."

47. Act § 44; 11 U.S.C. § 72.

48. Rule 209(b)(1), (2) and (4).

49. See discussion of Rule 117(b), *supra*.

50. Rule 210(a)-(d) inclusive.

51. Act § 5(c); 11 U.S.C. § 32(c).

52. Rule 210(e).

53. Rule 207(b).

54. Rule 209(d).

55. 11 U.S.C. § 53 *et seq.*

56. Rule 215(d).

57. Rule 215(f).

58. Rule 215(e). This conforms to prevailing decisions. See, e.g., *In re Hamilton Dis-*

Application for, and allowance of compensation of all officers of the estate—trustees, receivers, marshals,<sup>59</sup> attorneys and accountants is covered by Rule 219. All applicants are required to disclose all payments made or promised from any source, as well as all agreements with respect to sharing of compensation—except those within a firm of lawyers or accountants.<sup>60</sup> Attorneys for bankrupts and petitioning creditors may share compensation with attorneys contributing to the services rendered, but not with a mere forwarding attorney.<sup>61</sup>

Attorneys for bankrupts are subject to further stringent regulation insofar as compensation is concerned. They are required to disclose all compensatory arrangements from any source regardless of whether they seek compensation from the estate.<sup>62</sup> Any payment made or promised by the bankrupt may be examined by the court and, to the extent deemed excessive, may be avoided or recovered.<sup>63</sup>

#### *D. Notices to Creditors*

Rule 203 prescribes the time and manner of notice to be given to creditors. Sub-paragraph (b) contains a new provision authorizing the court to include, where appropriate, in the notice of first meeting a statement to the effect that since there are no assets from which a dividend can be paid, it is not necessary to file claims. The notice should further state that if and when sufficient assets become available for payment of a dividend, creditors will be given further notice and ample opportunity to file their claims.<sup>64</sup> This rule should eliminate the tremendous amount of time and clerical service now devoted to filing, and docketing of claims in no-asset cases.

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tributors, Inc., 440 F.2d 1178 (7th Cir. 1971); *In re Mabson Lbr. Co.*, 394 F.2d 23, 24 N.3 (2d Cir. 1968).

59. On rare occasions a U.S. Marshal may act as a receiver. Rule 202 *Cf.* Act § 2(a)(3), (5); 111 U.S.C. § 11(a)(3), (5).

60. Rule 219(a).

61. Rule 219(d). The provision of the Act which authorized division with forwarding attorneys (§ 62(c); 11 U.S.C. 102(c)) was expressly excluded because of its obvious inconsistency with the Canon 34 of the Canons of Professional Ethics and Disciplinary Rule 2-107 of the Code of Professional Responsibility adopted by the American Bar Association. Advisory Committee Note, Rule 215.

62. Rule 219(b).

63. Rule 220.

64. Rule 203(b). See discussion of Rule 302, accompanying note 68 *infra*.

### E. Examinations

A final significant area covered in Part II is the all important subject of examinations. Rule 205 restates, in substance, the present provisions of Sections 7(a)(10), 21(a) and (b) and 55(b) of the Act.<sup>65</sup> The only differences are the elimination of the provision for examination before state court judges and the relaxation of territorial limits.<sup>66</sup> As under former law, the examination may relate to the acts, conduct or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or his right to discharge.<sup>67</sup>

## PART III

### CLAIMS AND DISTRIBUTION TO CREDITORS

Rules 301 to 310 which deal with proofs of claim and distribution to creditors are largely declaratory of existing law. Two innovations have been adopted which should expedite existing practice and avoid potential inequities.

Where notice of no dividend has been given under Rule 203(b)<sup>68</sup> and a dividend subsequently becomes available, creditors may file claims within 60 days after receiving notice to that effect, or six months after the first meeting of creditors, whichever is later.<sup>69</sup>

If a tax or wage creditor fails to file a proof of claim on or before the date of the first meeting of creditors, the bankrupt may execute and file proof of claim in the creditor's name.<sup>70</sup> This permits a discharged bankrupt to protect himself from liability for payment of a non-dischargeable tax or wage claim which would have been fully or partially paid from the estate, if the taxing body had not failed to file its claim.

## PART IV

### THE BANKRUPT—DUTIES AND BENEFITS

Rules 401 to 409 deal with those aspects of the bankruptcy

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65. 11 U.S.C. §§ 25(a)(1); 44 (a), (b); 71(b).

66. Formerly, a person other than the bankrupt could not be required to attend more than 100 miles from his residence. Act § 41(a); 11 U.S.C. § 69(a). Subpoenas are now governed by Rule 45 of the Rules of Civil Procedure and thus may be served any place within the district and any place outside the district within 100 miles of the place of hearing or trial.

67. Rule 205(d) *Cf.* In re Foerst, 93 Fed. 190, 191 (S.D.N.Y. 1899); 2 COLLIER ON BANKRUPTCY ¶ 21.05, at 277 (14th ed. 1971) [Hereinafter cited as COLLIER.]

68. See discussion, *supra*, note 64 and accompanying text.

69. Rule 302(e)(4).

70. Rule 303.

proceeding most important to the individual bankrupt—the discharge of indebtedness and the setting apart of exemptions. By and large the rules tend to continue the trend toward expanding the protection given the debtor by the Act.<sup>71</sup>

Rule 401 introduces a wholly new concept to straight bankruptcy proceedings. Formerly, creditors were not precluded from prosecuting claims against the bankrupt unless and until the court, on application of a party in interest, issued a restraining order.<sup>72</sup> Under Rule 401, however, the initiation of a proceeding automatically stays any action and all enforcement proceedings, then pending or subsequently commenced, so long as the debt is provable and not excepted from discharge under Section 17(a)(1), (5), (6) or (7) of the Act. The stay continues until annulled or modified on application or a creditor showing cause therefor, or until the case is either dismissed, or discharge is denied, or waived.

The procedure with respect to exemptions is prescribed by Rule 403. The bankrupt claims his exemptions in the first instance by making appropriate entry in his schedules.<sup>73</sup> Within 15 days after qualification the trustee must report on the amounts allowed and disallowed.<sup>74</sup> If no objections are filed, the court approves the trustee's report as filed.<sup>75</sup> If objections are filed by the bankrupt or by any creditor the matter is then heard and determined by the court. The burden of proof is on the party objecting to the report.<sup>76</sup>

Rule 403(f) codifies the existing case law which permits a

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71. For example, in 1970, Congress substantially amended the Act to grant to the bankruptcy court virtually exclusive jurisdiction to determine whether any particular debt is or is not dischargeable under Section 17 of the Act (11 U.S.C. § 35). Formerly, the court had such jurisdiction only under special and unusual circumstances. *Local Loan v. Hunt*, 292 U.S. 234, 241-2 (1933). For an excellent discussion of the background and effect of the 1970 amendment, see Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L. J. 1 (1971).

72. Except that the Act does provide for a stay from the limited period from the filing of the initial petition to adjudication or dismissal. ACT § 11(a); 11 U.S.C. § 29(a).

73. Rule 403(a).

74. Rule 403(b). If no trustee qualifies, the bankruptcy judge (See note 91, *infra*) prepares the report; if the bankrupt objects, the court will then appoint a trustee or receiver. Rule 403(d).

75. Rule 403(e). Query, where the trustee's report recommends disallowance of any or all of the exemptions claimed by the bankrupt, why should it be necessary for the bankrupt to then file objections which will merely restate his original claim?

76. This burden of proof provision can be questioned on two grounds. First, even though probably consistent with former case law, is it really appropriate to place the burden on the objecting party in all instances whether he be the bankrupt or a creditor? Second, is this really a procedural matter? Does not the imposition of the burden of proof really venture into the area of substantive law?

spouse, dependent children or other persons similarly situated to claim exemption when by virtue of death or other reason the bankrupt fails to do so.<sup>77</sup>

Rules 404-408, inclusive cover the all-important matter of discharge.<sup>78</sup> The procedure for hearing and determination of objections to discharge as well as the general effect of the discharge order are spelled out by Rule 404 which is largely declaratory of former procedure. The objection to discharge is, however, now designated a complaint and the proceedings are "adversary" and thus governed by Part VII.

One significant departure from present practice is the elimination of the requirement that corporate bankrupts must affirmatively apply for a discharge. All bankrupts who pay their filing fees will now be entitled to discharge unless expressly<sup>79</sup> or impliedly waived<sup>80</sup> or unless objections are filed and sustained.<sup>81</sup>

The burden of proof in discharge cases<sup>82</sup> is somewhat modified. Rule 408 provides that the plaintiff (objecting creditor) "has the burden of proving the facts essential to his objection". Section 14(c) of the Act<sup>83</sup> provided that:

If, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision (c), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

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77. See, e.g., *In re Youngstrom*, 153 F. 98 (8th Cir. 1907); *In re Edelman*, 172 F. Supp. 200, 202 (E.D.N.Y. 1959); *In re Maxson*, 170 F. 356 (N.D. Iowa 1909); *In re Luby*, 155 F. 659 (S.D. Ohio 1907).

78. The discharge is the order whereby the bankruptcy court discharges the honest bankrupt of all his provable debts except those specifically excepted from the operation of the discharge under § 17 of the Act (11 U.S.C. § 35). Every bankrupt is entitled to the entry of an order of discharge unless:

- a. Specific objection is made to the court by a party in interest who alleges and established to the satisfaction of the court that the bankrupt has committed one or more of the offenses specified by Section 14(c) of the Act (11 U.S.C. § 32(c)), or
- b. The bankrupt has failed to pay the required filing fee. Under the 1970 amendments to Sections 14 and 17 jurisdiction is granted to the bankruptcy court, not only to determine whether to grant the discharge, but also, with minor exceptions, which debts are affected by the discharge. See note 71 *supra*, and authorities there cited.

79. See Rule 405.

80. See Rule 406.

81. Rule 404(d). See also Advisory Committee Note to Rule 405.

82. Here again, we have a possible encroachment on substantive law. See note 10, *supra*.

83. 11 U.S.C. § 32(c).

This is generally construed to require the objector to make out a prima facie case.<sup>84</sup> The rule would impose only "the initial burden of producing evidence and the ultimate burden of persuasion" and "leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence."<sup>85</sup>

Rule 409 prescribes the procedure for determining dischargeability under the 1970 amendments.<sup>86</sup> The principal departures from present practice are three-fold. First, hearings on dischargeability, like hearings on discharge itself, are designated as adversary proceedings, and thus governed by the Rules of Part VII.<sup>87</sup> Next, special provisions are made for shortening the usual time periods in those cases where the court gives notice of no dividend under Rule 203(b).<sup>88</sup> Finally, sub-paragraph (c) provides that where a jury trial is demanded, the trial of the dischargeability issue must be placed on the jury calendar of the district court, unless: (1) the bankruptcy judge<sup>89</sup> determines that the issue is not triable of right by a jury,<sup>90</sup> or (2) a local rule of court provides otherwise. Thus, unlike the situations under Rule 115(b),<sup>91</sup> the referee in a hearing on dischargeability may preside over a jury trial only where specifically authorized by local rule.

## PART V

### DUTIES OF OFFICERS AND PERSONNEL OF BANKRUPTCY COURTS

Consistent with the general objective of the Rules<sup>92</sup> there are several provisions in Part V<sup>93</sup> which tend to upgrade the referee as a judicial officer. For example, Rule 506 promises to relieve the

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84. See *In re Pioch*, 235 F.2d 903, 905 (3d Cir. 1956) and other cases cited in Advisory Committee Note to Rule 407.

85. Advisory Committee Note to Rule 407.

86. See notes 71 and 78 *supra*.

87. Rules 409(d), 701.

88. Rule 409(a)(2). See notes 64 and 68, *supra*, and accompanying text.

89. The term "bankruptcy judge" is used in the new rules to denote "the referee of the court of bankruptcy in which a bankruptcy case is pending, or the district judge of that court when issuing an injunction under § 2(a)(15) of the Act and when acting in lieu of a referee under § 43(c) of the Act or under Rule 102." Rule 901(7).

90. The weight of authority now holds that there is no right of jury trial on the issue of dischargeability itself, but only as to the merits of a claim after it has been determined to be nondischargeable. See *In re Swope*, \_\_\_ F.2d \_\_\_, CCH BKPTCY. SERV. ¶ 64, 562 (7th Cir. 1972), Countryman, *supra*, n.71 p. 35(f). But see Herzog, *Case for Jury Trials on the Issue of Dischargeability*, 46 AM. BANK. L.J. 235 (1971); *In re Law Research, Inc.*, CCH BKPTCY. SERV. ¶ 64, 526 (S.D.N.Y. 1972).

91. See note 24, *supra* and accompanying text.

92. See notes 11 and 12, *supra*, and accompanying text.

93. Rules 501 to 515, inclusive.

referee from the great mass of administrative detail presently imposed upon him by authorizing him to "delegate any ministerial function to an assistant employed in his office, or with the approval of the chief judge of the district court" to any person employed in the office of the clerk of the district court. Similarly, Rule 512 grants to the referees in each district the authority formerly reserved to the judges<sup>94</sup> to designate banking institutions as depositories for the funds of estates.

The dignity and judicial nature of the referee and his court should be further enhanced by Rule 511 requiring a verbatim record of all proceedings wherever practicable. The record may be taken either by electronic sound recording or by a shorthand reporter employed with authorization of the court.<sup>95</sup>

Rule 515 deals with reopening estates. It removes doubts and uncertainties which have heretofore existed in two areas.<sup>96</sup> First, it states explicitly that estates may be opened in order to accord relief to the bankrupt as well as to administer assets. Second, it specifies clearly that application to reopen shall be filed with the clerk of the district court, who shall thereupon forthwith refer the application to the referee for further proceedings.

A particularly salutary rule will reduce the serious injustices that sometimes result from inadvertent filing in the wrong office. Rule 509(c) provides that:

(c) Error in Filing.—A paper intended to be filed but erroneously delivered to the trustee or receiver, or the attorney for either of them, or to the district judge, referee, or clerk of the district court, shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the proper person. In the interest of justice, the court may order that the paper shall be deemed filed as of the date of its original delivery.

## PART VI

### COLLECTION AND LIQUIDATION OF THE ESTATE

The concept of the automatic stay applied to personal actions against bankrupts under Rule 401 is extended by Rule 601(a) to proceedings for the enforcement of any lien against property in the

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94. Act § 61; 11 U.S.C. § 301.

95. Rule 511(a).

96. See Advisory Committee note to Rule 515 and authorities therein cited.

97. The original draft of the rule (PREL. DFT. 158-159) provided that in every such case the paper should automatically be deemed filed as of the date of the delivery. It is difficult to understand why the final revision made the retroactive filing only discretionary.



custody of the bankruptcy court, or any lien obtained within four months before bankruptcy by attachment, judgment, levy or other means.<sup>98</sup>

Unless terminated, annulled or modified by court order, the stay remains in effect until the end of the proceeding or until the property affected is set apart as exempt, abandoned or transferred.<sup>99</sup>

To obtain relief from a stay under Rule 601, as under Rule 401, it is necessary to file a formal complaint initiating an adversary proceeding.<sup>100</sup> Once the complaint is filed, however, the party seeking to continue the stay has the burden of establishing that he is entitled to it.<sup>101</sup>

*Ex parte* relief from a stay may be granted only on (1) a showing that immediate irreparable injury, loss, or damage is imminent, and (2) a certification of the efforts to give notice and the reasons why notice should not be required.<sup>102</sup>

Rule 602(b) contains a new provision requiring the receiver or trustee to give notice of the proceeding to every bank, building and loan association, utility company, landlord, insurance company or other person known to be holding the bankrupts money or other property subject to withdrawal or order of the bankrupt. This is, of course, designed to limit the possibilities of moneys being inadvertently paid the bankrupt rather than the receiver or trustee.<sup>103</sup> Although the Advisory Committee note indicates that failure to give the notice will not exempt a transfer from challenge under Section 70(d), nothing in the Rule itself tends to support this conclusion.

Rule 606 deals with the all-important subject of appraisal and sale of the property of the estate. Appraisal—which a literal reading of present Section 70f of the Act<sup>104</sup> requires in every instance—may be waived where the court so directs.<sup>105</sup> All sales must

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98. There is serious question whether this automatic stay or the stay under Rule 401 affects either the Federal or State Governments in view of the general rule that governmental agencies must be specifically named in order to be subject to a restraining order. *See, e.g., U.S. v. United Mine Workers*, 330 U.S. 258, 272-3, (1946).

99. Rule 601(b), PREL. DFT. 170.

100. *See* Rule 701 and related discussion, *infra*.

101. Rule 601(c).

102. Rule 601(d), PREL. DFT. 171.

103. *See* ACT § 70(d)(2); 11 U.S.C. § 110(d)(2), also *Bank of Marin v. England*, 385 U.S. 99 (1966).

104. 11 U.S.C. 110(f).

105. Rule 606(a). This is consistent with case law and actual practice. *See* Robertson

be subject to court approval, unless the court specifically orders otherwise.<sup>106</sup> The rule continues the policy<sup>107</sup> of requiring sales at public auction except where good cause is shown on written application.<sup>108</sup>

One of the inherent and essential powers of a court of bankruptcy is its authority to sell encumbered property free and clear of liens and encumbrances. The court may order such a sale only when the property is in the actual or constructive possession of the court, and when there is a reasonable possibility of realizing an equity for the estate.<sup>109</sup> Recognizing the basic, inherent adversary nature of any such sale, the rules provide that an application for sale free of liens or security interest shall be deemed an adversary proceeding and be governed by the procedural rules set forth in Part VII.<sup>110</sup>

## PART VII ADVERSARY PROCEEDINGS

Part VII<sup>111</sup> contains the detailed procedural rules for most of the contested matters which will be litigated within the bankruptcy proceeding.<sup>112</sup> Pursuant to Rule 701 the Part VII rules apply to any proceedings before a bankruptcy judge<sup>113</sup> to:

(1) recover money or property, (2) determine the validity, prior-

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v. Howard, 229 U.S. 54, 64 (1913); Bragg v. Gerstel, 148 F.2d 757, 760 (5th Cir. 1945), 4 A COLLIER at 1122, n.5.

106. Rule 606(b)(1); PREL. DFT. 182. Presumably the court would "order otherwise" only after fixing an upset price. See Advisory Committee Note, *supra* 183-184. Better practice should dictate that the sale be subject to court approval in all but the most extreme cases of rapidly perishable or highly burdensome property.

107. General Order 18, 11 U.S.C. § 53 *et seq.*

108. Rule 606(b)(2).

109. See 4A COLLIER ¶ 70.99, and cases there cited.

110. Rules 606(b)(3), 701. The application of the Part VII rules will undoubtedly tend to delay the sale of encumbered assets in most cases, thus increasing expenses of administration, and frequently reducing the amount ultimately realized. It is debatable whether the protection afforded by the more formalized procedure is sufficient to justify the economic disadvantages.

111. Rules 701-782, inclusive.

112. As a general rule the bankruptcy court has exclusive, summary jurisdiction, to hear and determine controversies pertaining to property within the actual or constructive possession of the trustee. ACT § 23; 11 U.S.C. § 46. Where the controversy concerns property outside the possession or control of the trustee and where the adverse party does not consent to summary jurisdiction, it is usually necessary to institute plenary proceedings in a State or Federal Court of competent jurisdiction. ACT §§ 2(a)(7), 23; 11 U.S.C. §§ 11(a)(7), 46; 2 COLLIER ¶ 23.01-08 at 433-550.

113. See note 89, *supra*.

ity or extent of a lien or other interest for which the holder can be compelled to take a money satisfaction, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, (7) avoid an obligation [for fees of a bankrupt's attorney] under Rule 220, or (8) determine the dischargeability of a debt,

all of which are designated as "adversary proceedings". In addition, the Part VII rules apply to a limited extent to all other contested proceedings which arise within the bankruptcy case.<sup>114</sup>

The express objective of Part VII is to apply the Federal Rules of Civil Procedure, with a minimum of necessary departures, to all adversary proceedings. The Rules are therefore not numbered consecutively, but rather are correlated with the numbering of the Civil Procedure Rules. Many of the Rules in Part VII do nothing more than expressly provide for the applicability of their Civil Procedure counterparts.<sup>115</sup>

The principal departures from civil practice are in connection with service of process and setting dates for trials. As in civil cases<sup>116</sup> the adversary proceeding is commenced by filing a complaint.<sup>117</sup> Immediately on filing, the court will set a trial date and issue summons and notice of trial.<sup>118</sup>

In addition to personal service<sup>119</sup> and other methods allowed under the Federal Rules of Civil Procedure,<sup>120</sup> service may be made by mail,<sup>121</sup> and in some instances by publication.<sup>122</sup>

Mail service may be made on any defendant by any form of mail requiring a signed receipt. Specific directions for the place of service of each type of entity are set forth in subparagraph (1) through (8) of Rule 704(c). Proof of service by mail must include

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114. Rule 914 makes Rules 721, 725, 726, 728-737, 741, 742, 744.1, 752, 754-756, 769 and 771 applicable to all contested matters not otherwise governed by the rules, unless the court otherwise directs. In addition Rule 121 discussed *supra*, provides that Rules 705, 708-710, 715, 716, 724-726, 728-737, 744.1, 756 and 762 shall, unless otherwise directed, apply to contested adjudications and proceedings to vacate an adjudication.

115. Rule 716 *e.g.*, succinctly states that "Rule 16 of the Federal Rules of Civil Procedure applies in adversary proceedings."

116. See FED. R. CIV. P. 3.

117. Rule 703.

118. Rule 704(a).

119. Rule 704(b).

120. Rule 704(d)(1); FED. R. CIV. P. 4(e).

121. Rule 704(c).

122. Rule 704(d)(2).

the signed receipt or other satisfactory proof that delivery was actually made to, or else was refused by, the addressee.<sup>123</sup>

Where service cannot be effected either personally, by mail, or by the prescribed alternate means, and where the proceeding is designed to determine or protect rights in the custody of the court, service may be made, with court approval, by mailing the papers to the party's last known address and by at least one publication in the manner and form directed by the court.<sup>124</sup>

Unlike the corresponding Civil Procedure Rule, Rule 704(e) contains strict time requirements. Personal service must be made within three days after issuance of summons. When the service is made by mail, the papers to be served must be deposited in the mail within the three day period. In all other cases the time is fixed by the court.

Perhaps the most important departure from civil practice is found in Rule 704(f) which authorizes service of all process, other than a subpoena,<sup>125</sup> anywhere within the United States. Service may also be made in a foreign country in those cases where domestic service is not essential to the court's jurisdiction.<sup>126</sup>

The time for response is 25 days from issuance of the summons, not from service, and may be varied by court order.<sup>127</sup> The objective is to permit trial to be set, in most cases, no later than 30 days after filing of the complaint.<sup>128</sup>

Rule 713 excuses a party sued by a trustee or receiver from the mandatory counterclaim requirements of Civil Procedure Rule 13. An interesting and highly desirable provision is Rule 782 which, unlike all the other Part VII rules, has no counterpart in either present banking practice or in the Rules of Civil Procedure.<sup>129</sup> On notice and hearing, any adversary proceeding may, in the interest of justice and for the convenience of justice, be transferred to any other district, whereupon it shall be referred to a referee of that district and proceed as if originally filed therein. Heretofore trans-

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123. Rule 704(g).

124. Rule 704(d)(2); PREL. DFT. 198.

125. A subpoena may still be served only within the limits prescribed by Rule 45. Rule 916. The reasons for this distinction are not at all clear. The Rules could well have authorized nationwide service of subpoenas, along with all other process, along with provision for adequate reimbursement for time and expenses of witnesses.

126. See Advisory Committee Note to Rule 704(f)(2) and authorities therein cited.

127. Rule 712.

128. Advisory Committee Notes to Rules 704(a) and 712.

129. See however 28 U.S.C. §§ 1404, 1406 providing for transfer of civil cases in appropriate circumstances.

fers of bankruptcy proceedings could only be effected by a transfer of the entire case under Sections 32(b) and (c) of the Act.<sup>130</sup>

### PART VIII APPEAL TO THE DISTRICT COURT

Part VIII<sup>131</sup> governs the procedure for appeals from the referee to the district judge. Both in the definition and prescription of the mechanics of appeal, and in the elimination of the archaic nomenclature associated with "petitions for review" the new Rules provide a vast improvement over former statutory and case law.

Formerly, appeals from a referee were designated "petitions for review" and were controlled by Section 39(c) of the Act.<sup>132</sup> The petition was required to be filed with the referee within ten days after the entry of the order appealed from, or within such further time as the court on petition filed within the ten day period, would allow. Both the order complained of and the alleged errors in respect thereto, had to be set forth in the petition. The referee was then required to certify the petition "promptly" to the clerk of the court,<sup>133</sup> but no specific time limit was prescribed, and no satisfactory procedure was provided for enforcement if the referee either failed to certify or delayed unduly.<sup>134</sup>

The new Rules have completely abolished this obsolete procedure, and have substituted a procedure patterned on the Federal Rules of Appellate Procedure. The appeal is taken by filing a simple notice of appeal<sup>135</sup> within ten days after entry of the judgment or order appealed from.<sup>136</sup> The time may be extended for an additional period of not more than 20 days on a request made before expiration (or after expiration, on a showing of excusable neglect) provided the judgment or order does not authorize the sale of any property.<sup>137</sup>

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130. 11 U.S.C. § 55(b), (c).

131. Rules 801 to 814, inclusive.

132. 11 U.S.C. § 67(c). See note 13, *supra*.

133. Act § 39(a)(8); 11 U.S.C. § 67(a)(8).

134. It had been suggested that the appropriate remedy was to apply to the judge for an order in the nature of a writ of mandamus against the referee. See 2 COLLIER, ¶ 39.25 at 1510 and cases therein cited to the effect that if the petition were not certified by the referee in a reasonable time, it could be dismissed for laches. Inordinate delay in certification was by no means unusual in actual practice, and the remedy of mandamus was, for obvious reasons, rarely invoked and highly ineffective.

135. Rule 801.

136. Rule 802(a). Cross-appeals may be filed within ten days after the first notice of appeal or within the time otherwise prescribed by Rule 802, whichever last expires.

137. Rule 802(c), *Ibid* 249.

Rule 802(b) like Rule 4(a) of the Federal Rules of Appellate Procedure, terminates the running of time for appeal on filing with the referee any of the following motions: a motion for judgment notwithstanding a verdict on a contested adjudication under Rule 115(b)(4);<sup>138</sup> a motion to amend or make additional findings of fact; or a motion for a new trial or to amend or alter the judgment under Rule 923. As under present federal appellate practice, however, a *petition for rehearing* does not stay or affect the running of the time for appeal.<sup>139</sup>

Procedure for supersedeas,<sup>140</sup> designation,<sup>141</sup> and transmittal<sup>142</sup> of the record, and filing of briefs<sup>143</sup> are basically similar to appeals to a court of appeals except that time periods are generally shorter.

Parties are not required to furnish an appendix, and briefs need not be printed or prepared in any prescribed format.

The parties are entitled to oral argument unless otherwise provided by local rules or court order.<sup>144</sup>

As under former General Order 47<sup>145</sup> the referees' findings of fact are to be accepted unless clearly erroneous—due regard must be given to the opportunity of the referee to judge the credibility of witnesses.<sup>146</sup>

The district court may, by local rule, suspend the Part VIII rules dealing with transmittal of the record, filing of briefs, oral argument and rehearing, but the basic provisions regarding perfecting the appeal and its disposition may not be altered.<sup>147</sup>

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138. Through an apparent oversight, however, the rule does not refer to judgment n.o.v. following a jury trial on a non-dischargeable debt or related proceeding covered by Rule 409(c). The Advisory Note to Rule 802 indicates most strongly that it was the Committee's intent that such a motion be included. A clarifying amendment would be most desirable.

139. But see the recent decision of *In re Penco Corp.*, \_\_\_ F.2d \_\_\_, CCH BANKRUPTCY SERV ¶ 64,555 (4th Cir. 1972) apparently holding to the contrary. This decision seems most unsound since it rests on the authority of *Pfister v. Northern Illinois Finance Co.*, 317 U.S. 144, 153 (1942), a case specifically abrogated by the 1970 amendments to § 39(c). See 2 COLLIER ¶ 39.01 at 1468.

140. Rule 805.

141. Rule 806.

142. Rule 807.

143. Rule 808.

144. Rule 809.

145. 11 U.S.C. § 53 *et seq.* Although General Order 47 referred to hearings on reports of referees and special masters, its standards were generally held applicable to petitions for review.

146. Rule 810. *Cf.* FED. R. CIV. P. 52(a).

147. Rule 814.

## PART IX GENERAL PROVISIONS

Part IX<sup>148</sup> contains the definitions and general provisions which apply throughout the Rules. Most of these rules are substantially declaratory of existing practice. There are, however, one or two innovations which are worthy of special note.

Rule 915 dealing with objections to summary jurisdiction of the bankruptcy court<sup>149</sup> contains a highly desirable revision of former law. Under the old procedure if objections to summary jurisdiction were sustained the court had no alternative but to dismiss the proceeding and the parties were then compelled to commence a complete new plenary proceeding. Rule 915(b) now permits the court, where *federal* plenary jurisdiction is present,<sup>150</sup> to transfer the proceeding to the civil docket of the district court whereupon it shall continue "as if filed as a civil action in the district court on the date it was filed in the court of bankruptcy."

Rule 920 grants to the referee a limited power to punish contempts without the necessity of certification to the judge.<sup>151</sup> Contempts may be punished by the referee if actually committed in his presence, and if the punishment is limited to a fine of not more than \$250.00. Imprisonment or a larger fine may be ordered only by the judge on certification from the referee.

## CONCLUSION

Viewed in their entirety, the new Rules represent a monumental improvement in the administration of Bankruptcy proceedings. Many of the promised reforms are long overdue; all represent the results of ceaseless and devoted effort over a ten-year period of a committee singularly well-equipped to formulate an efficient and

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148. Rules 901-929.

149. See note 112, *supra*.

150. Federal Courts have *plenary* jurisdiction over proceedings instituted by trustees in bankruptcy not only in all instances provided in the Judicial Code, such as diversity of citizenship, federal question, etc. (28 U.S.C. §§ 331(ff)) but also in all cases involving preferential or fraudulent transfers and in all cases where the defendant consents. Act §§ 23, 60, 67a, 70(e); 11 U.S.C. §§ 46, 96, 107(a), 110(e).

151. *Cf.*, Act § 41(b); 11 U.S.C. § 69(b). This rule was bitterly criticized by Justice Douglas in his dissent from the adoption of the Rules generally. He found it "alarming to vest appointees of bankruptcy courts with the power to punish for contempt." With due deference we might suggest that the fault, if any, lies with the statutory provisions for appointment and not with the grant to judicial officers of a minimum degree of control of the proceedings over which they preside.

equitable mechanism to achieve the objectives of the Bankruptcy Act.

The Committee and its staff are particularly to be commended for their foresight in having solicited and considered the comments and suggestions of the bench and bar. The final product, which reflected many of these suggestions is worthy of enthusiastic support of the entire legal and commercial community.



